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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 34

SEARS, ROEBUCK AND CO., a New York corporation,
Petitioner,

vs.

BRUCE A. MACKEY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR THE RESPONDENT.

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IN THE

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No. 34

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Petitioner,

vs.

BRUCE A. MACKEY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR THE RESPONDENT.

OPINIONS BELOW.

The opinion of the Court of Appeals is reprinted at pages 40-46 of the Record and is reported at 218 F.2d 295. The memoranda of the District Court are reprinted at pages 20-34 of the Record. The District Court's order and judgment are reprinted at pages 34-36 of the Record.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 1254(1) of the Judicial Code. 28 U.S.C. § 1254(1), 62 Stat. 928.

STATUTES AND RULES INVOLVED

Section 1291 of the Judicial Code (28 U.S.C. § 1291, 62 Stat. 929):

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . ."

Section 1292 of the Judicial Code (28 U.S.C. § 1292, 62 Stat. 929):

> "The courts of appeals shall have jurisdiction of appeals from:
>
> "(1) Interlocutory orders of the district courts of the United States, . . . or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions."

Original Rule 54(b) of the Federal Rules of Civil Procedure (28 U.S.C., following § 723(c)):

> "Judgment at Various Stages. When more than one claim for relief is presented in an action, the court at any stage, upon a determination of the issues material to a particular claim and all counterclaims arising out of the transaction or occurrence which is the subject matter of the claim, may enter a judgment disposing of such claim. The judgment shall terminate the action with respect to the claim so disposed of and the action shall proceed as to the remaining claims. In case a separate judgment is so entered, the court by order may stay its enforcement until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered."

Amended Rule 54(b) of the Federal Rules of Civil Procedure (28 U.S.C.A.):

> "Judgment Upon Multiple Claims. When more than one claim for relief is presented in an action,

whether as a claim, counterclaim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims."

QUESTION PRESENTED.

1. Whether the Court of Appeals erred in denying petitioner's motion to dismiss respondent's appeal?

   (a) Would the judgment of the District Court have been final and appealable under Section 1291 of the Judicial Code prior to the amendment to Rule 54(b) of the Federal Rules of Civil Procedure, and is it therefore final and appealable under the amended Rule, the requisite determination and direction having been made by the District Court?

   (b) Is the judgment of the District Court final and appealable under Section 1291 by virtue of amended Rule 54(b) of the Federal Rules of Civil Procedure; whether or not final and appealable prior to the amendment to that Rule?

   (c) If not appealable under Section 1291, is the judgment of the District Court denying an injunction appealable under Section 1292(1).

STATEMENT OF THE CASE.

The complaint, in six counts, was filed by Bruce A. Mackey, respondent here, and Time Saver Tools, Inc., a corporation wholly owned by Mackey. Sears, Roebuck & Co., the petitioner, is the only defendant.

The complaint alleges that between 1949 and 1952, Sears deliberately destroyed three separate businesses successively engaged in by Mackey, pursuant to Sears' predatory purpose to discipline its suppliers and to monopolize trade and commerce in violation of the antitrust laws.

In 1949, Sears deliberately set out to destroy and did destroy Mackey's lamp business by means of localized price-cutting. (Count II—R. 8.) In 1952, by means of a threatened secondary boycott, Sears induced a third party, Vascoloy, to breach its contract with Mackey under which Mackey received commissions on certain sales by Vascoloy. (Count III—R. 9.) Also in 1952, Sears violated Time Saver's patent rights and was guilty of unfair competition with Time Saver's tool business, in an attempt to destroy this business. (Counts IV and V—R. 9-10.) The successive predatory acts were carried on pursuant to a deliberate and announced plan of Sears to destroy Mackey's business activity, and for the purpose of disciplining Sears' suppliers and monopolizing trade and commerce. On the basis of such conduct, Mackey claimed treble damages and equitable relief under the antitrust laws (Count I—R. 2-8) and damages under the common law. (Count VI—R. 10-11.)

In summary, the complaint was as follows:

Count I:

Mackey's claim for treble damages and an injunction under the antitrust laws.

Count II:

Mackey's claim for the wilful destruction of his lamp business.

Count III:

Mackey's claim for inducing breach of his commissions contract with Vascoloy.

Count IV:

Time Saver's patent and unfair competition claims.

Count V:

Time Saver's claim under Section 2(f) of the Robinson-Patman Act, which was abandoned after this Court's decision in *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61 (1953). R. 20.

Count VI:

Mackey's claim under the common law for damages resulting from Sears' continuing predatory program.

Petitioner answered Count III and filed a motion to dismiss the other counts. R. 17-20. This motion was granted as to all counts, except Count VI to the extent that it duplicates Count III. R. 35. With respect to Counts I and II, the District Court denied leave to amend, and in accordance with amended Rule 54(b), made an express determination of no just reason for delay and entered judgment dismissing these counts. R. 35-36. Count IV was dismissed with leave to amend (R. 35); amended Count IV is at issue.

Thus, all of Mackey's claims, except his claim for inducing breach of contract, have been dismissed; his claims based upon his lamp business and his claims based upon Sears' continuing predatory conduct are out of the case. There remain for trial only Mackey's claim based on his

Vascoloy contract and Time Saver's claim with respect to its tool business.

The judgment entered by the District Court was in the form submitted by petitioner. All parties considered it final and appealable.[1] Mackey appealed (R. 36), and after the printed record and Mackey's brief were filed in the Court of Appeals, Sears moved to dismiss the appeal on the ground that the order of the District Court was not final. R. 39. This motion was denied by the Court of Appeals. R. 47. Sears' petition for *certiorari* was granted. 348 U.S. 970 (1955). The determination of Mackey's appeal on the merits is being held in abeyance in the Court of Appeals.

The question before this Court is whether the Court of Appeals erred in denying the motion to dismiss the appeal, or, stated another way, whether the judgment of the District Court was appealable. This Court is not confined, as petitioner suggests, to a determination of whether the Court of Appeals based its decision on the right ground.

SUMMARY OF ARGUMENT.

The sole question presented by this case is whether the Court of Appeals correctly denied petitioner's motion to dismiss respondent's appeal.

The District Court's judgment would have been appealable under original Rule 54(b) and is therefore appealable under the amended Rule, the requisite findings having been made by the District Court. And even if not appealable under the original Rule, the judgment is appeal-

[1] Petitioner's "Memorandum of Law in Support of Defendant's Motion to Dismiss the Appeal", filed in the Court of Appeals (at p. 8): "Attorneys for defendant approved the order, understanding that a final appealable order was being entered pursuant to Rule 54(b)."

able under Section 1292(1) because of the refusal to grant an injunction. Accordingly, it is not necessary to the decision in this case to consider the effect of amended Rule 54(b).

The Court may nevertheless wish to consider the question of the appealability of the judgment solely on the basis of the amendment to Rule 54(b). It may wish to do so even though the conflict previously existing in the Circuits, if conflict there was, has been eliminated by the decision of the Second Circuit in *Rieser* v. *Baltimore & Ohio Railroad Co.*, 224 F.2d 198 (C.A. 2d 1955), decided after the grant of *certiorari* in this case. But even if the Court considers the appealability of the judgment solely on the basis of the amended Rule, the sole question then presented is whether the District Court correctly applied the amended Rule to this case. There is not presented, as petitioner suggests in its "Questions Presented" (Petitioner's Brief, p. 2), the abstract question whether the district courts can "automatically and conclusively" determine appellate jurisdiction. Just as it ignores the grounds for affirmance other than the amended Rule, petitioner ignores the real question with respect to the amended Rule, to-wit: In this specific case, is the judgment of the District Court, entered in accordance with the amended Rule, final and appealable?

Nowhere in petitioner's brief is there a suggestion that multiple claims for relief are not involved. Nowhere is there a suggestion that the District Court erred in finding that there was no just reason for delay. Nowhere is there a suggestion that the District Court did not comply with the provisions of the amended Rule for the entry of final judgment. In fact, petitioner's brief hardly discusses what is a final judgment, but pleadingly asserts and reasserts the abstract proposition that district courts cannot "auto-

matically and conclusively" determine appellate jurisdiction.

Rule 54(b) findings are not automatic and conclusive. They are reviewable by the appellate courts and they have been reviewed and appeals have been dismissed notwithstanding such findings. The district courts do not determine appellate jurisdiction under the amended Rule or under any other rule regulating proceedings in the district courts, however much such rules affect appealability. Jurisdiction is conferred by statute. The straw man set up by petitioner thus has no place in the case.

The first essential to the consideration of the application of the amended Rule to this case is a fair and detailed analysis of the complaint. R. 2-11. It is apparent from the complaint that multiple claims are involved. It is also apparent that the judgment of the District Court would have been appealable under original Rule 54(b). The judgment of the District Court finally disposed of some claims, retaining others for trial. The claims remaining for trial—respondent's claim for inducing breach of his commission contract and Time Saver's claim for patent infringement and unfair competition with its tool business—are separate and distinct on pre-amendment standards from the claims based upon the destruction of respondent's lamp business and the antitrust and common law claims growing out of petitioner's predatory program of destruction of any business entered into by respondent. The judgment being appealable on pre-amendment tests and the findings prescribed by the amended Rule having been made, the judgment is appealable. Petitioner defaults on this issue.

Even if the judgment would not have been appealable under original Rule 54(b), it is nevertheless appealable

under amended Rule 54(b). All courts which have had to decide the issue have now adopted the so-called "affirmative view" of amended Rule 54(b), that is, that where the express determination and express direction are properly made in a multiple claims case, in accordance with the amended Rule, the judgment is appealable, whether or not appealable under original Rule 54(b). The First, Second, Third and Seventh Circuits, if not also the Fourth, have so expressed themselves. Other Circuits have considered the merits of appeals where the Rule 54(b) findings have been made, respecting these findings unless clearly erroneous.

The lone dissenting voice at present is that of the Court of Appeals for the District of Columbia which recently, by way of dictum, repeated its earlier dictum that it agreed with the decision of the Second Circuit in *Flegenheimer* v. *General Mills, Inc.*, 191 F.2d 237 (C.A. 2d 1951), which held that the amended Rule does not have such affirmative effect. *Capital Transit Co.* v. *District of Columbia*, ... F.2d ....., 21 Fed. Rules Serv. 54b.4, Case 7 (C.A.D.C. 1955). But the District of Columbia Circuit has never dismissed an appeal in a multiple claims case where the Rule 54(b) findings were made, and *Flegenheimer* has now been expressly overruled by the Second Circuit itself. *Rieser* v. *Baltimore & Ohio Railroad Co.*, 224 F.2d 198, 204 (C.A. 2d 1955). Upon the repudiation of *Flegenheimer*, the conflict in the Circuits previously existing has been removed. The Courts of Appeals are now virtually unanimous in their support of the validity of amended Rule 54(b) as affirmatively interpreted. Their opinion, after several years of experience in the actual administration of the amended Rule, should be given great weight.

Petitioner's brief is confined to an exposition of the so called "negative view" of the amendment to Rule 54(b). Under this view, the amendment gives no help in the determination of when a judgment is final and appealable, but only provides a way for the district court to indicate that its judgment is not final, by not making the express determination and direction for the entry of final judgment; if final judgment is entered in accordance with the amended Rule, it is only appealable, under the negative view, if it would have been appealable under original Rule 54(b). It is argued that the amendment was intended to have only this limited effect, and that if the amendment is interpreted affirmatively (*i.e.*, to make any judgments appealable which were not appealable under the original Rule), it is invalid.

The draftsmen of the amendment have repeatedly stated that the amended Rule was intended to have affirmative effect. The language of the amendment expresses this intention. The words "final judgment", which do not appear in the original Rule, were used in the amended Rule to describe the judgment to be entered by the District Court. "Final judgment" connotes appealability, particularly where followed by the concluding sentence of the amended Rule providing that in the absence of the required findings the action does not terminate and the decision is tentative and subject to revision by the District Court.

Perhaps the clearest indication of the intention that the amendment have the affirmative effect the authors claim for it is its general purpose, acknowledged by petitioner, to clarify and give certainty in this confused area. It is true that in those multiple claims cases where there is just reason for delay and therefore the Rule 54(b) findings are not made, certainty is being achieved as litigants become familiar with the amended Rule. But if

the effect of the amendment is confined to cases where the certificate is withheld by the trial judge, the certainty achieved in these cases will be at the cost of greater uncertainty and confusion in cases where the Rule 54(b) findings are made. For in any case in which a district court complies with Rule 54(b) and enters final judgment, the losing party cannot in safety refrain from appealing, lest in a later appeal he be met with the argument that he should have appealed from this final judgment. See *Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507 (1950).

The mechanics of the application of the amended Rule provide still another indication of the intention that the amendment be given affirmative effect. If the amendment had been intended to have only a negative effect, merely giving the district courts power to postpone appealability, it would seem that it would have provided a way for the district courts to accomplish this purpose by some prescribed act. It is accomplished now only by non-action. the non-entry of the findings prescribed by the amended Rule. Thus, under the negative view, the alleged purpose of the amended Rule is accomplished by non-action, while the action which it prescribes in detail for the entry of final judgment would add nothing to the situation under the original Rule.

Except for petitioner, only *Flegenheimer*, now expressly overruled, suggested that the amendment was not intended to have affirmative effect. All other xpressions of the negative view attacked the affirmative view on the question of the power of this Court to effect such a change in appealability by an exercise of its rule-making power.

This Court's power to effect the change made by Rule 54(b), as affirmatively interpreted, is squarely supported

by the decision in *Reeves* v. *Beardall*, 316 U.S. 283 (1942). That case upheld the validity of original Rule 54(b) under which certain judgments which were not appealable under the pre-Rules practice became appealable by virtue of the Rules. No change was made in the jurisdiction of the appellate courts either by original Rule 54(b) or by the amendment. Jurisdiction is conferred by Section 1291 and its predecessors. The Rules, including many other than 54(b), merely regulate the procedure in the district courts. Such Rules necessarily affect appealability, but this does not render them invalid.

Even the negativists conceded that the amendment can prevent appeals of judgments appealable under original Rule 54(b) and even under pre-Rules practice, if the judge withholds the findings required by the amended Rule. Accelerating appealability under the affirmative view of the amended Rule no more affects appellate jurisdiction than does postponing appealability under the negative view. However characterized, the change resulting from the affirmative interpretation of amended Rule 54(b), from the practice under original Rule 54(b), is in all respects similar to the change caused by original Rule 54(b), which was universally approved, from the practice prevailing prior to the Rules.

This is the kind of case for which both original Rule 54(b) and the amended Rule were intended, and the amended Rule as here applied is valid. The Court of Appeals therefore correctly denied petitioner's motion to dismiss the appeal.

ARGUMENT.

I. The judgment of the District Court would have been appealable prior to the amendment to Rule 54(b); the requisite findings having been made in accordance with the amended rule, the judgment is appealable.

a. The Court should consider the appealability of the judgment of the District Court on pre-amendment tests.

The Court of Appeals expressly declined to pass upon the appealability of the District Court's judgment under original Rule 54(b) (R. 46), and rested its decision on the amendment to Rule 54(b). In doing so, it suggested that this Court should determine the validity of amended Rule 54(b) in order to reconcile divergent views among and within the Court of Appeals. R. 44. This divergence of views has been substantially reduced, if not eliminated, so that the need for such a determination has been correspondingly reduced. In any event, this case may not present the opportunity for such a determination, since the judgment appealed from would have been appealable on pre-amendment tests.

All courts and all judges, including those who have adhered to the so-called "negative" view of the Amended Rule,[2] have agreed that a judgment which would have been appealable under original Rule 54(b) prior to its amendment, is appealable now if the express determination and express direction are made in accordance with the

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[2] **Flegenheimer v. General Mills, Inc.**, 191 F. 2d 237, 241 (C.A. 2d 1951); **Bendix Aviation Corp. v. Glass**, 195 F. 2d 267 (C.A. 3rd 1952), concurring opinion of Judge Hastie at p. 280. See concurring opinion of Judge Frank in **Pabellon v. Grace Line, Inc.**, 191 F. 2d 169, 176 (C.A. 2d 1951), **cert. denied**, 342 U.S. 893 (1951).

amended Rule.[3] Accordingly, if the judgment of the District Court would have been appealable prior to the amendment to Rule 54(b), the Court of Appeals properly denied petitioner's motion to dismiss the appeal.

This ground alone is sufficient to dispose of this case, without considering the effect of the amendment to Rule 54(b). Yet petitioner has nowhere argued or even suggested that the judgment of the District Court would not have been appealable on pre-amendment tests. Rather, petitioner asks this Court to reverse the Court of Appeals' decision based upon the effect of the amended Rule and to remand the case to that court for a consideration of the appealability of the judgment of the District Court on pre-amendment tests.[4] Petitioner's Brief, p. 50. In the interest of preventing piecemeal appeals, this Court is asked to ignore other grounds for affirmance and to decide only if the *reasoning* of the Court of Appeals was correct,

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[3] 6 Moore's Federal Practice, Second Edition (1953), p. 221.

[4] The effect of such a disposition will be to delay further this already protracted litigation. Consider its history: The complaint was filed on May 21, 1953. R. 2. On July 14, 1953, petitioner filed a motion to dismiss the entire complaint on 29 grounds. R. 11-17. Approximately five months later, petitioner filed an amended motion to dismiss the complaint (except Count III, which it answered, R. 17-18), abandoning most of the 29 grounds urged in its original motion. R. 18-20. After delays in the filing of petitioner's brief, the District Court delivered its memoranda on May 12, 1954 (R. 20-33) and May 13, 1954 (R. 34). On May 19, 1954, the District Court entered its order and judgment in the form submitted and approved by petitioner. R. 34-36. See p. 8 of petitioner's "Memorandum of Law in Support of Defendant's Motion to Dismiss the Appeal," filed in the Court of Appeals: "Attorneys for defendant approved the order, understanding that a final appealable order was being entered pursuant to Rule 54(b)." Notice of appeal was filed on June 8, 1954. R. 36. On November 15, 1954, after respondent had filed the printed record and his printed brief in the Court of Appeals, petitioner moved to dismiss the appeal or to extend time for its brief, and in any event, to postpone oral argument of the appeal. R. 39.

presumably leaving for a later appeal the determination of whether the decision was correct on other grounds.

b. The judgment of the District Court would have been appealable under original Rule 54(b), though not under the pre-Rules practice.

Prior to the Federal Rules of Civil Procedure, it was well settled that, except in certain special situations, a judgment was ordinarily not appealable unless it was "final not only as to all the parties, but as to the whole subject-matter and as to all the causes of action involved." *Collins* v. *Miller,* 252 U.S. 364, 370 (1920). *Arnold* v. *United States,* 263 U.S. 427 (1923); *Nyanza Steamship Co.* v. *Jahncke Dry Dock No. 1,* 264 U.S. 439 (1924). The recognized exceptions were mainly three: First, statutory exceptions for certain specified interlocutory orders, now embodied in Section 1292 of Title 28. Second, orders disposing of "matter distinct from the general subject of the litigation and affecting only the parties to the particular controversy." *United States* v. *River Rouge Improvement Company,* 269 U.S. 411, 414 (1926). *Withenbury* v. *United States,* 72 U.S. 819 (1867); *Trustees* v. *Greenough,* 105 U.S. 527 (1882); *Williams* v. *Morgan,* 111 U.S. 684 (1884); *Central Trust Co.* v. *Grant Locomotive Works,* 135 U.S. 207 (1890); *Hill* v. *Chicago & Evanston Railroad Co.,* 140 U.S. 52 (1891). See *Cohen* v. *Beneficial Industrial Loan Corporation,* 337 U.S. 541 (1949). Third, orders which result in the transfer of property or other acts, where if no appeal is allowed immediately, the right to review may be defeated. *Forgay* v. *Conrad,* 6 How. 201, 12 L. Ed. 404, (1848). See *Cobbledick* v. *United States,* 309 U.S. 323, 324-325 (1940).

The statutory requirement of finality as a condition of appealability has, for all practical purposes, been unchanged since the Judiciary Act of 1789.[5] The non-statutory exceptions to the rule of finality stated in *Collins* v. *Miller* were developed by court decisions with no material change in the statute limiting appellate jurisdiction to review of final judgments.

The merger of law and equity and the liberalization of permissive joinder resulting from the adoption of the Federal Rules increased the number and importance of multiple claim actions. Original Rule 54(b) was intended to regulate the procedure in the District Courts affecting appeals in such cases. No change was made in the jurisdictional requirement of finality; nor was any such change intended. 28 U.S.C. §2072. *Sibbach* v. *Wilson,* 312 U.S. 1, 10 (1941). Original Rule 54(b) merely redefined the judicial unit to which the requirement of finality attaches by providing for the entry of judgment in a multiple claims suit upon a particular claim and all counterclaims arising out of the transaction which is the subject-matter of such claim. 6 Moore's Federal Practice, Second Edition (1953), pp. 6, 21, 162-165, 167-169. Such judgments under original Rule 54(b) were consistently held to be final and appealable. While appellate jurisdiction was not thereby affected, appeals were permitted under original Rule 54(b) which had not been allowed under the pre-Rules practice requiring a complete disposition of all claims involved in the litigation. *Ibid*, pp. 7-8, 165.

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[5] The 1789 provision read as follows:

"That final decrees and judgments in civil actions in a district court . . . may be reexamined and reversed or affirmed in a circuit court. . . ." 1 Stat. 73, 84.

Section 1291 now reads:

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . ." 28 U.S.C. § 1291, 62 Stat. 929.

This change was first recognized in *Collins* v. *Metro-Goldwyn Pictures Corp.*, 106 F. 2d 83 (C.A. 2d 1939), in which the Second Circuit overruled its pre-Rules decision in *Sheppy* v. *Stevens*, 200 Fed. 946 (C.A. 2d 1912), and by virtue of original Rule 54(b) held appealable a judgment which it conceded would not have been appealable prior to the Federal Rules. The case involved two claims by one plaintiff against one defendant. One claim was for copyright infringement and the other for unfair competition, the former based upon the use of the content of plaintiff's copyrighted book as the subject-matter of a motion picture, the latter based upon the use of the title of the book as the title of the motion picture.

In *Reeves* v. *Beardall*, 316 U. S. 283 (1942), this Court expressly approved the decision in *Collins* v. *Metro-Goldwyn Pictures Corp.*, upheld the validity of original Rule 54 (b), and restated the doctrine that the statutory requirement of finality could be satisfied by a final disposition of less than the entire litigation. In so doing, it answered most, if not all, of the arguments made here by petitioner.

The *Reeves* complaint was in three counts. Count I was a claim against an executor on a promissory note executed by the decedent. Count II was a claim against the executor on a contract in which decedent had agreed not to change her will in consideration of plaintiff's return of certain securities and plaintiff's promise not to press for payment of the note. Count III was a claim against a third party, Hamer, to recover assets which formerly belonged to decedent and which plaintiff claimed under the contract with decedent.

Count II was dismissed and the District Court ordered that "final judgment" be entered on Count II in favor of defendant. The Court of Appeals for the Fifth Circuit

dismissed plaintiff's appeal on the ground that the order appealed from was not final. Because of the conflict with *Collins* v. *Metro-Goldwyn Pictures Corp.*, this Court granted *certiorari*. 316 U.S. 283, 284. It reversed the decision of the Court of Appeals for the Fifth Circuit and held the order final and appealable.

The Court stated that original Rule 54(b) and the provisions of the Federal Rules with respect to joinder and separate trials indicated a "definite policy" (the Court quoting from *Collins* v. *Metro-Goldwyn Pictures Corp.*) to permit the entry of a separate judgment where the claims are entirely distinct:

> ". . . Such a separate judgment will frequently be a final judgment and appealable, though no disposition has been made of the other claims in the action. . . .
>
> "The Rules make it clear that it is 'differing occurrences or transactions, which form the basis of separate units of judicial action'. *Atwater* v. *North American Coal Corp.* (CCA 2d) 111 F (2d) 125, 126 . . . If a judgment has been entered which terminates the action with respect to such a claim, it is final for purposes of appeal. . . ." 316 U.S. 283, 285.

Applying these standards to the judgment in *Reeves* v. *Beardall*, the Court stated that the claim on the promissory note arose out of a transaction wholly separate from the claim not to change the will. It also noted that Hamer's liability could arise only if the contract not to change the will was sustained, so that it was not a case of dismissing one of two defendants alleged to be jointly liable on the same claim.

Reeves v. *Beardall* established the tests to be used in the application of original Rule 54(b). In a multiple claims case, a judgment finally disposing of a separate

and distinct claim is appealable notwithstanding other claims between the same parties remain for trial. The effect of the Rule as thus authoritatively interpreted was to make certain judgments appealable which had not been prior to the Rules.

Tested on the standards of *Reeves* v. *Beardall* and *Collins* v. *Metro-Goldwyn Pictures Corp.*, the judgment of the District Court in this case would have been final and appealable under original Rule 54(b). Respondent's claims are separate and distinct from each other and from those of Time Saver. This is not a case where one act or event gives rise to several legal wrongs or one claim for relief is based on several grounds or legal theories. Three transactions, events or occurrences, separated in time and involving different business enterprises, and even different claimants, and a separate overall predatory program, are the basis of the multiple claims.

If claims based on Metro-Goldwyn's publication of one motion picture are separate and distinct (*Collins* v. *Metro-Goldwyn Pictures Corp.*, 106 F. 2d 83 (C. A. 2d 1939)), and claims based on decedent's note and decedent's contract not to change a will in consideration of forbearance on the same note are separate and distinct (*Reeves* v. *Beardall*, 316 U. S. 283 (1942)), surely claims based upon petitioner's various wrongful acts directed successively at respondent's lamp and commission businesses and his corporation's tool business are separate and distinct. Nor is this result altered by the fact that in addition to the separate claims based on the wrongs directed at the separate businesses, respondent has asserted claims based upon petitioner's continuing plan to destroy any business engaged in by respond-

ent. Petitioner's persistent pursuit of respondent is distinct from the acts by which this pursuit is accomplished.

The judgment of the District Court left for trial only Time Saver's tool-claims and respondent's claim based on inducing breach of his commissions contract. These are separate and distinct from each other and from respondent's lamp claim which was entirely removed from the case by this judgment. Hence, the judgment dismissing respondent's lamp claim, his antitrust claim and his common law claim based upon petitioner's predatory pursuit of him, would have been final and appealable under original Rule 54(b) on the authority of *Reeves* v. *Beardall*.*

The application of the principles of *Reeves* v. *Beardall* and *Collins* v. *Metro-Goldwyn Pictures Corp.* is illustrated both by the cases under original Rule 54(b) in which certain judgments were held to be final and appealable and by those in which other judgments were held to be non-final and accordingly non-appealable.

The following are representative examples of judgments held to be final under the original Rule on the authority of *Reeves* v. *Beardall* and *Collins* v. *Metro-Goldwyn Pictures Corp.*:

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* It is interesting to note that Judge Learned Hand, upon whom petitioner relies so heavily in its argument on the amended Rule (Petitioner's Brief, p. 10), was one of the judges who decided **Collins v. Metro-Goldwyn Pictures Corp.** It can hardly be doubted that he would have held the judgment here to have been appealable under the original Rule.

(a) Cases involving separate claims either of several claimants,[7] several defendants,[8] or several claimants and several defendants.[9]

(b) Cases involving multiple claims of a single claimant against one defendant.[10]

Both groups of cases support the appealability of the judgment of the District Court in this case under original Rule 54(b) tests. The application of *Reeves* v. *Beardall* is, however, more clearly illustrated by the latter group.

In *Karl Kiefer Machine Co.* v. *United States Bottlers Machinery Co.*, 108 F. 2d 469 (C.A. 7th 1939), decided prior to *Reeves* v. *Beardall*, a single plaintiff sued a single defendant for infringement of two patents by two separate acts. An order dismissing the count dealing with the claim of infringement of one of the patents was held to be final and appealable on the authority of *Collins* v. *Metro-Goldwyn Pictures Corp.*

Sidis v. *F-R Publishing Corp.*, 113 F. 2d 806 (C.A. 2d 1940), involved three claims by one plaintiff against one

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[7] **Gibbons v. Equitable Life Assurance Society, 173 F. 2d 337 (C.A. 2d 1949).**

[8] **Lydick v. Fischer, 135 F. 2d 983 (C.A. 5th 1943); Moreno v. United States, 120 F. 2d 128 (C.A. 1st 1941).**

[9] **Dickinson v. Petroleum Conservation Corp., 338 U.S. 507 (1950); California Apparel Creators v. Wieder of California, Inc., 162 F. 2d 893 (C.A. 2d 1947); cert. den. 332 U.S. 816 (1947); Crutcher v. Joyce, 134 F. 2d 809 (C.A. 10th 1943).**

[10] **Karl Kiefer Machine Co. v. United States Bottlers Machinery Co., 108 F. 2d 469 (C.A. 7th) 1939); Sidis v. F-R Publishing Corp., 113 F. 2d 806 (C.A. 2d 1940); Musher Foundation, Inc. v. Alba Trading Co., Inc., 127 F. 2d 9 (C.A. 2d 1942), cert. denied, 317 U.S. 641 (1942); Zalkind v. Scheinman, 139 F. 2d 895 (C.A. 2d 1943). See Hanney v. Franklin Fire Ins. Co. of Philadelphia, 142 F. 2d 864 (C.A. 9th 1944).**

defendant. Defendant's magazines were alleged to have contained matter damaging to plaintiff. One count was for damages for violation of plaintiff's right of privacy; another was for violation of rights under New York statutes; a third was for malicious libel under the laws of several other states. An order dismissing the first two counts was held appealable on the authority of *Collins* v. *Metro-Goldwyn Pictures Corp.* The court noted that different evidence of publication would be necessary in the proof of the claims.

Musher Foundation, Inc. v. *Alba Trading Co., Inc.*, 127 F.2d 9 (C.A. 2d 1942) and *Zalkind* v. *Scheinman*, 139 F. 2d 895 (C.A. 2d 1943), both involved a count for patent infringement and a count for unfair competition. In neither case was there jurisdiction based upon diversity of citizenship. In both, the District Courts dismissed the non-federal claim for want of federal jurisdiction on the authority of *Hurn* v. *Oursler*, 289 U.S. 238 (1933). In both, the Court of Appeals for the Second Circuit affirmed, holding that where a non-federal claim is dismissed because it does not allege merely a different ground for recovery for the same act that is the ground for a federal claim with which it is joined, the non-federal claim is a separate and distinct claim the final disposition of which is appealable under original Rule 54(b).

The cases which held district court judgments non-final and non-appealable under original Rule 54(b) are further evidence of the appealability of the judgment in this case on tests prevailing under the original Rule. They can be divided into two general categories: first, cases involving judgments which did not determine compulsory counterclaims as required by the very words of original

Rule 54(b),[11] and second, cases involving judgments which were not "internally final" in that they did not finally determine a single claim, such as judgments leaving the amount of damages for later determination,[12] judgments disposing of some but not all of the grounds asserted or elements of damages in cases involving single claims for relief,[13] judgments dismissing some but not all of defendants alleged to be jointly liable,[14] and judgments dismissing a claim with leave to amend.[15]

It is clear that the judgment of the District Court in this case does not fall into any of the foregoing categories.

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[11] **Audi Vision, Inc. v. RCA Manufacturing Co., Inc.**, 136 F. 2d 621 (C.A. 2d 1943); **Libbey-Owens-Ford Glass Co. v. Sylvania Industrial Corp.**, 154 F. 2d 814 (C.A. 2d 1946); **Nachtman v. Crucible Steel Company of America**, 165 F. 2d 997 (C.A. 3rd 1948); **Toomey v. Toomey**, 149 F. 2d 19 (C.A.D.C. 1945); **Western Contracting Corp. v. National Surety Corp.**, 163 F. 2d 456 (C.A. 4th 1947). See also **Eastern Transportation Co. v. United States**, 159 F. 2d 349 (C.A. 2d 1947); **LoBue v. United States**, 178 F. 2d 528 (C.A. 2d 1949); **Parmelee v. Chicago Eye Shield Co.**, 157 F. 2d 582 (C.A. 8th 1946); **Schiel v. New York Life Ins. Co.**, 178 F. 2d 729 (C.A. 9th 1949).

[12] **Canister Co. v. National Can Corp.**, 163 F. 2d 683 (C.A. 3rd 1947); **Petrol Corp v. Petroleum Heat & Power Company**, 162 F. 2d 327 (C.A. 2d 1947).

[13] **United States v. Florian**, 312 U.S. 656 (1941); **Leonard v. Socony-Vacuum Oil Co.**, 130 F. 2d 535 (C.A. 7th 1942); **Munson Line, Inc. v. Green**, 165 F. 2d 321 (C.A. 2d 1948). See **Coffman Laboratories v. Federal Laboratories, Inc.**, 171 F. 2d 94 (C.A. 3rd 1948); **Wright v. Gibson**, 128 F. 2d 865 (C.A. 9th 1942). (See also, concurring opinion of Judge Clark in **Atwater v. North American Coal Corp.**, 111 F. 2d 125, 126 (C.A. 2d 1940); **Biggins v. Oltmer Iron Works**, 154 F. 2d 214 (C.A. 7th 1946).)

[14] **Dunaway v. Standard Oil Co.**, 178 F. 2d 884 (C.A. 5th 1949); **Hunteman v. New Orleans Public Serv. Inc.**, 119 F. 2d 465 (C.A. 5th 1941); **Photometric Products Corp. v. Radtke**, 157 F. 2d 849 (C.A. 2d 1946).

[15] **Atwater v. North American Coal Corp.**, 111 F. 2d 125 (C.A. 2d 1940).

It would certainly not have been held to be non-final under original Rule 54(b) on the authority of these cases. Multiple claims are involved. No counterclaims are left undetermined. And the disposition of each separate claim which was dismissed was internally final.

Thus, the judgment of the District Court meets the affirmative tests of *Reeves* v. *Beardall, Collins* v. *Metro-Goldwyn Pictures Corp.* and other cases involving final orders under original Rule 54(b) and does not come within the category of orders held to be non-final under the original Rule. It would, therefore, have been appealable under original Rule 54(b). The requisite finding under the amended Rule having been made, the order is appealable without regard to the effect of the amendment to the Rule. See *Burkhart* v. *United States,* 210 F.2d 602 (C.A. 9th 1954).

II. The judgment of the District Court is final and appealable under amended Rule 54(b), whether or not appealable under original Rule 54(b).

Petitioner's entire brief is devoted to amended Rule 54(b). Even so, it does not come to grips with the decisive question, to-wit: Is this a proper case for the application of the amended Rule and is the amended Rule valid as applied? This is the very kind of case to which both the original Rule and the amended Rule were intended to apply. And the amended Rule is valid as applied to this case.

a. The affirmative view of amended Rule 54(b) prevails; there is no longer a conflict in the Circuits.

Petitioner relies upon the decision of the Second Circuit in *Flegenheimer* v. *General Mills, Inc.,* 191 F.2d 237 (C.A. 2d 1951) (Petitioner's Brief, p. 10), just as it did in its

Petition for Certiorari urging a conflict within the Circuits as a reason for granting the writ. Petition for Certiorari, pp. 5-7. *Flegenheimer* has now been repudiated by the Second Circuit and the conflict accordingly eliminated.

The First,[16] Second,[17], Third,[18] possibly the Fourth,[19] and the Seventh Circuits[20] have expressly held that amended Rule 54(b) makes certain judgments appealable which would not have been under original Rule 54(b), and that the amended Rule is valid.[21] In addition, other Circuits, including even the District of Columbia Circuit,[22] have been consistently hearing appeals on the merits where the express determination and express direction are

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[16] **Boston Medical Supply Co. v. Lea & Febiger,** 195 F. 2d 853 (C.A. 1st 1952); **Francis v. Crafts,** 203 F. 2d 809 (C.A. 1st 1953).

[17] **Rieser v. Baltimore & Ohio Railroad Co.,** 224 F. 2d 198 (C.A. 2d 1955).

[18] **Bendix Aviation Corp. v. Glass,** 195 F. 2d 267 (C.A. 3rd 1952).

[19] **Town of Clarksville v. United States,** 198 F. 2d 238 (C.A. 4th 1952), **cert. denied,** 344 U.S. 927 (1953).

[20] **Mackey v. Sears Roebuck & Co.,** 218 F. 2d 295 (C.A. 7th 1955). R. 40-46.

[21] There is a suggestion of the rejection of the negative view by the Eighth Circuit in **Lockwood v. Hercules Powder Co.,** 172 F. 2d 775 (C.A. 8th 1949), in which no Rule 54(b) findings were made, but the opinion implies that such findings would have rendered the judgment appealable, though it would not have been prior to the amendment to Rule 54(b).

[22] **Capital Transit Co. v. District of Columbia,** ..... F. 2d ....., 21 Fed. Rules Serv. 54b.4, Case 7 (C.A. D.C. 1955); **Mow v. Republic of China,** ..... F. 2d ....., 21 Fed. Rules Serv. 54b.4, Case 6 (C.A. D.C. 1955); **Wiliams v. Protestant Episcopal Theological Seminary,** 198 F. 2d 595 (C.A. D.C. 1952), **cert. denied,** 344 U.S. 864, 344 U.S. 894 (1952); **Vale v. Bonnett,** 191 F. 2d 334 (C.A. D.C. 1951).

made in accordance with the amended Rule.[23] The only hangover of the *Flegenheimer* decision is in the District of Columbia Circuit which recently repeated, again by way of dictum, its earlier dictum in *Gold Seal Co.* v. *Weeks* 209 F.2d 802 (C.A. D.C. 1954), that it agrees with *Flegenheimer*. *Capital Transit Co.* v. *District of Columbia*, ... F.2d ....., 21 Fed. Rules Serv. 54b.4, Case 7 (C.A. D.C. 1955). Strangely, in its repetition of its reliance upon *Flegenheimer*, the District of Columbia Circuit in *Capital Transit* cited *Rieser* v *Baltimore & Ohio Railroad Co.* 224 F.2d 198 (C.A. 2d 1955), in which the Second Circuit overruled *Flegenheimer*. And the District of Columbia Circuit has never dismissed an appeal in a multiple claims case where the Rule 54(b) findings were made.[24]

The virtually unanimous view of the Courts of Appeals should be given great weight by this Court. The Courts of Appeals are charged with the supervision of the administration of the amended Rule, and reached their present agreement as to the interpretation of the amended Rule on the basis of several years of experience with its actual operation.

The former conflict, upon which petitioner relies, was between two views of the amendment, the prevailing one being generally described as "affirmative", the *Flegen-*

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[23] Fifth Circuit: **Buchanan v. Sinclair Oil & Gas Co.**, 218 F. 2d 436 (C.A. 5th 1955); **Kinnear-Weed Corp. v. Humble Oil & Refining Co.**, 214 F. 2d 891 (C.A. 5th 1954); **Oyster Shell Products Corp., Inc. v. United States**, 197 F. 2d 1022 (C.A. 5th 1952); Ninth Circuit; **Prickett v. Consolidated Liquidating Corp.**, 180 F. 2d 8 (C.A. 9th 1950). See **Waialua Agr. Co. v. Maneja**, 178 F. 2d 603 (C.A. 9th 1949). Eighth Circuit: See **Lockwood v. Hercules Powder Co.**, 172 F. 2d 775 (C.A. 8th 1949), footnote 21 above.

[24] In **Gold Seal**, the court held that multiple claims were not involved, while in **Capital Transit**, in which the **Gold Seal** dictum was repeated, the motion to dismiss the appeal was denied.

heimer view being generally described as "negative". Under the affirmative view, also referred to as the "Bendix Rule",[25] the effect of the amended Rule is to make certain judgments appealable that were not appealable prior to the amendment. The negative view, on the other hand, would confine the effect of the amendment to preventing appeals in cases where the express determination and express direction are not made; where the determination and direction are made, a judgment would be appealable under the negative view only if appealable under original Rule 54(b).

As previously stated, the affirmative view now prevails in all Circuits, with the possible exception of the District of Columbia Circuit. It is enthusiastically supported by Professor Moore, the leading text writer in this field and an important figure in the drafting of both the original Rule and the Amendment. 6 Moore's Federal Practice, Second Edition, pp. 5-9, 211.

The authorities for the negative view relied upon by petitioner are three—one decision of the Second Circuit,[26] now expressly overruled;[27] one concurring opinion in the Third Circuit,[28] never repeated; and dictum in two cases in the District of Columbia Circuit,[29] based expressly on

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[25] **Bendix Aviation Corp v. Glass, 195 F. 2d 267 (C.A. 3rd 1952).**

[26] **Flegenheimer v. General Mills, Inc., 191 F. 2d 237 (C.A. 2d 1951).**

[27] **Rieser v. Baltimore & Ohio Railroad Co., 224 F. 2d 198 (C.A. 2d 1955).**

[28] **Bendix Aviation Corp. v. Glass, 195 F. 2d 267, 277-282 (C.A. 3rd 1952).**

[29] **Gold Seal Co. v. Weeks, 209 F. 2d 802 (C.A. D.C. 1954); Capital Transit Co. v. District of Columbia, ... F. 2d ....., 21 Fed. Rules Serv. 54b.4, Case 7 (C.A. D.C. 1955).**

the now repudiated *Flegenheimer* decision of the Second Circuit.

The conflict relied on by petitioner terminated with the decision in *Rieser* v. *Baltimore & Ohio Railroad Co.*, 224 F.2d 198 (C.A. 2d 1955), in which the Second Circuit expressly overruled *Flegenheimer*, stating that that decision "cannot be taken as the present law of this Circuit". 224 F.2d 198, at p. 204. Judge Frank, who had been one of the exponents of the negative view,[30] acknowledged in a concurring opinion that two recent decisions of the Second Circuit[31] had overruled *Flegenheimer*. 224 F.2d 198, at pp. 205-206. See also, *Colonial Airlines, Inc.* v. *Janas*, 202 F.2d 914 (C.A. 2d 1953); *Phelan* v. *Middle States Oil Corp.*, 203 F.2d 836 (C.A. 2d 1953); *Republic of Italy* v. *DeAngelis*, 206 F.2d 121 (C.A. 2d 1953); *Cohen* v. *LaVin*, 210 F.2d 550 (C.A. 2d 1954); *Filt-O-Pure Products Corp.* v *Chemex Corp.*, 222 F.2d 424 (C.A. 2d 1955).

With the repudiation of *Flegenheimer* by the Second Circuit, there is no longer a conflict among the Circuits. The *Bendix* rule prevails, giving affirmative effect to the amended Rule in accordance with the intention of its draftsmen.

b. The amendment to Rule 54(b) was intended to have the affirmative effect of making certain District Court judgments appealable whether or not appealable under original Rule 54(b).

Petitioner reluctantly concedes that Judge Clark and Professor Moore, the principal authors of the amendment to Rule 54(b), intended it to have "affirmative" effect, *i.e.*, to make appealable certain orders not previously appeal-

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[30] Concurring opinion in **Pabellon v. Grace Line, Inc.**, 191 F. 2d 169 (C.A. 2d 1951), **cert. denied**, 342 U.S. 893 (1951).

[31] **Rao v. Port of New York Authority**, 222 F. 2d 362 (C.A. 2d 1955); **United Artists Corp. v. Masterpiece Products, Inc.**, 221 F. 2d 213 (C.A. 2d 1955).

able. Petitioner's Brief, p. 18, n. 3. Both have repeatedly stated that this was their intention. 6 Moore's Federal Practice, Second Edition, 1953, pp. 7-8, 205-207, 211, 225. *Pabellon* v. *Grace Line, Inc.*, 191 F. 2d 169 (C.A. 2d 1951), *cert. denied*, 342 U.S. 893 (1951); *Lopinsky* v. *Hertz Drive-Ur-Self Systems, Inc.*, 194 F. 2d 422 (C.A. 2d 1951). See *Telechron, Inc.* v. *Parissi*, 197 F. 2d 757, 759 (C.A. 2d 1952).

Professor Moore states the purposes of the amendment as follows:

> "Amended Rule 54(b) has three goals: (1) to restrict appeals in litigation involving multiple claims; (2) to give the district court discretionary power to enter a final judgment upon one or more but less than all of the claims; and (3) to reduce the uncertainty as to finality, in connection with an adjudication by the district court." 6 Moore's Federal Practice, Second Edition (1953), pp. 205-206. See *Bendix Aviation Corp.* v. *Glass*, 195 F. 2d 267, 269 (C.A. 3rd 1952).

In discussing the discretion given the district courts, Professor Moore states unequivocally that "some adjudications are now final and hence appealable as such, that would not have been under original Rule 54(b) or the pre-Rules practice." Moore, op. cit., p. 207.

The purpose of restricting appeals is accomplished in those cases where there *is* just reason for delay, and accordingly, the district courts do not direct the entry of final judgment. This is so under either the negative or the affirmative view. But the purpose of reducing uncertainty cannot be accomplished if the "negative" view is adopted. If the amendment's effect is confined, as petitioner insists, to cases in which the Rule 54(b) findings are not made, certainty in such cases will have been achieved at the cost of uncertainty and multiplicity of piecemeal appeals in cases in which the findings are made.

Consider respondent's dilemma in this case if the negative view prevails. Judgment is entered in accordance with Rule 54(b) in form agreed upon by the parties. The parties want it to be final and appealable, and the parties and the District Court think it is final and appealable. Surely, respondent could not refrain from appealing and run the risk that a later appeal would be dismissed on the ground that this judgment was final. See *Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507 (1950). In the face of a district court's express determination of no just reason for delay and express direction for the entry of judgment, every cautious litigant will be compelled to appeal to protect his right to appeal. If the effect of the Rule 54(b) findings is to require the losing litigants to appeal, as surely it is, such judgments ought to be appealable.

The intention of the draftsmen of the amended Rule is evidenced by the language used. The judgment which the court may order is described as "a final judgment" and such a judgment is to be entered only where "there is no just reason for delay." In the original Rule, the comparable provisions were "may enter a judgment disposing of such claim. The judgment shall terminate the action with respect to the claim so disposed of. * * *"

With the experience under the original Rule clearly in mind, the use of the words "final judgment" to describe the action of the District Court, could hardly have had any purpose other than to make such judgments appealable, as the draftsmen state. "Final" in this context is a word of art connoting appealability. Particularly is this so where the provision for final judgment is followed by the concluding sentence of the amended Rule stating that where the determination and direction are not made, the

decision is subject to revision—hence not appealable—until judgment is entered on all claims.

The structure of the amended Rule is further evidence of the intent of the draftsmen that a final judgment entered in accordance therewith be appealable, without regard to its appealability under the original Rule. The amendment describes with particularity the manner in which a "final judgment" is to be entered. No way is prescribed for the entry of a non-final judgment; the amended Rule merely states that if its final judgment requirements are not met, the decision of the trial judge upon the particular claim "shall not terminate the action". If the amended Rule was intended to provide nothing more than a device to indicate non-finality, it was certainly an inversion to create such a device by particularizing acts indicating finality, with non-finality to be indicated only by the non-performance of the acts of finality.

There is no basis for the argument that the amended Rule was not *intended* to have affirmative effect. Except for the now repudiated statement in *Flegenheimer* and the argument in petitioner's brief, none of the exponents, or rather former exponents, of the negative view, suggested that affirmative effect was not intended. Rather, they attacked the amended Rule as exceeding this Court's rule-making power. See concurring opinions in *Bendix Aviation Corp.* v. *Glass*, 195 F.2d 267, 277-282 (C.A. 3rd 1952), and *Pabellon* v. *Grace Line, Inc.*, 191 F.2d 169, 176-181 (C.A. 2d 1951), *cert. denied*, 342 U.S. 893 (1951).[32] The questions of power are easily

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[32] **Gold Seal Co. v. Weeks, 209 F. 2d 802 (C.A. D.C. 1954) and Capital Transit Co. v. District of Columbia, ... F. 2d, ..., 21 Fed. Rules Serv. 54b.4, Case 7 (C.A. D.C. 1955), merely state, by way of dictum in both cases, that the District of Columbia Circuit follows Flegenheimer. In Capital Transit, the District of Columbia Circuit cites Rieser v. Baltimore & Ohio Railroad Co., 224 F. 2d 198 (C.A. 2d 1955), without noting that it expressly overruled Flegenheimer.**

resolved. See below, pp. 32-37. And both the Third Circuit[33] and the Seventh Circuit,[34] in their expressions of the affirmative view, have considered and rejected the *Flegenheimer* suggestion that affirmative effect was not intended. With the repudiation of *Flegenheimer itself*,[35] petitioner stands alone on this issue. All authorities now agree that affirmative effect was intended.

c. The amendment to Rule 54(b) is valid as affirmatively interpreted.

Intent aside, the principal reason given by those adhering to the negative view is that the amended Rule would be invalid if given affirmative effect. Concurring opinions in *Pabellon* v. *Grace Line*, 191 F.2d 169, 176-181 (C.A. 2d 1951), *cert. denied*, 342 U.S. 893 (1951), and *Bendix Aviation Corp.* v. *Glass*, 195 F.2d 267, 277-282 (C.A. 3rd 1952). Under this view, it is beyond the rule-making power of this Court to make judgments appealable which would not have been appealable prior to the change in the Rules; such an effect would result in a modification of appellate jurisdiction, and therefore conflict with statutes fixing such jurisdiction.

In the first place, this negative view overlooks or at least misses the import of this Court's decision in *Reeves* v. *Beardall*, 316 U.S. 283 (1942). For, as affirmatively interpreted to make appealable certain orders not appealable prior to the amendment, the amended Rule effects no greater change than that effected by the original

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[33] **Bendix Aviation Corp. v. Glass, 195 F. 2d 267, 269 (C.A. 3rd 1952).**

[34] **Mackey v. Sears, Roebuck and Co., 218 F. 2d 295, 298 (C.A. 7th 1955). R. 45.**

[35] **Rieser v. Baltimore & Ohio Railroad Co., 224 F. 2d 198 (C.A. 2d 1955).**

Rules. If original Rule 54(b) was a valid exercise of this Court's rule-making power notwithstanding it effected such a change—as was held by *Reeves* and the many cases under the original Rule—so is the amended Rule.

Secondly, the amendment does not change appellate jurisdiction. The statutory jurisdictional requirement of finality remains. 28 U.S.C. §1291. A judgment disposing of a particular claim in a multiple claims case must be a complete and final disposition of that claim, just as it would have to be a complete and final disposition of it if it were the sole claim in suit. The statutory concept of finality looks to internal finality, that is, complete disposition of the particular claim. It does not require complete disposition of the entire litigation. This is the import of the decisions both before and under the original Rules, carving out of the entire litigation, separate judicial units for separate and final and appealable disposition.

In the words of Professor Moore:

> ". . . The smallest judicial unit which would support the rendition of a final judgment was no longer to be a claim and a compulsory counterclaim, if any; but was to include all types of claims arising out of a single transaction or occurrence.
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> • • •
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> ". . . Under amended Rule 54(b), the action involving multiple claims is in its entirety a judicial unit, subject to the power of the district court to treat an adjudication of any one or more claims as a judicial unit and direct the entry of a final judgment thereon, provided it makes 'an express determination that there is no just reason for delay' and 'an express direction for the entry of judgment.'

> "While this standard of finality does affect the appeality of orders, the rule does not attempt to modify or supersede the appellate jurisdictional statutes, which generally require a final judgment as a prerequisite to an appeal, although they allow interlocutory appeals in certain instances. Operating as it does within the framework of the jurisdictional statutes, amended Rule 54(b) is valid despite some judicial views to the contrary." 6 Moore's Federal Practice, Second Edition (1953), pp. 7-8.

The affirmative effect of the amendment does not make any judgments final which do not completely dispose of a particular claim for relief.[36] It does, however, make judgments finally disposing of a particular claim appealable without regard to the status of other claims in the litigation and without regard to the relationship of the particular claim to the other claims. Thus, the change wrought by the amendment is not in the statutory concept of finality, but only in the timing of appeals where there are multiple claims and some but not all are finally disposed of.

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[36] **Gold Seal Co. v. Weeks**, 209 F. 2d 802 (C.A. D.C. 1954); **United States Plywood Corp. v. Hudson Lumber Co.**, 210 F. 2d 462 (C.A. 2d 1954); **Leonidakis v. International Telecoin Corp.**, 208 F. 2d 934 (C.A. 2d 1953); See **Kuly v. White Motor Co.**, 174 F. 2d 742 (C.A. 6th 1949). With respect to cases involving one claim against several defendants, compare **District 65, Distributive, Processing and Office Workers' Union v. McKague**, 216 F. 2d 153 (C.A. 3rd 1954); **Steiner v. 20th Century-Fox Film Corp.**, 220 F. 2d 105 (C.A. 9th 1955); **Hardy v. Bankers Life & Casualty Co.**, 222 F. 2d 827 (C.A. 7th 1955); and **Brandt v. Renfield Importers, Ltd.**, 216 F. 2d 206 (C.A. 8th 1954); with **Boston Medical Supply Co. v. Lea & Febiger**, 195 F. 2d 853 (C.A. 1st 1952); and **Vale v. Bonnett**, 191 F. 2d 334 (C.A. D.C. 1951). See **United Artists Corp. v. Masterpiece Products, Inc.**, 221 F. 2d 213 (C.A. 2d 1955). See **Waialua Agr. Co. v. Maneja**, 178 F. 2d 603 (C.A. 9th 1949). 6 Moore's Federal Practice, Second Edition (1953), pp. 182, 245-248. See also cases cited at p. 45 of petitioner's brief.

Again, in the words of Professor Moore:

> ". . . There is no warrant in Rule 54(b) for the district court to make a final judgment out of a partial adjudication of a claim: even though the court makes the 'express determination' and the 'express direction' it must have adjudicated at least one or more claims so that the adjudication measures up to the general principles of finality" 6 Moore's Federal Practice, Second Edition (1953), p. 8.

The courts which have adhered to the affirmative view of the amended Rule have recognized this concept of internal finality and have generally described the effect of the amendment as procedural, that is, dealing with district court mechanics affecting appeals but not with appellate jurisdiction. The court below, for example, likens the effect of the amendment to that of Rule 73(a) shortening the time for taking an appeal. In this sense, appealability is affected, though no change is made in the jurisdictional requirement of finality. In the words of the court below, whether the district judge withholds a certificate to prevent an appeal, or grants a certificate to permit an appeal, he "is timing his final decision on less than all of the claims in a multiple claims suit. Under either approach, the jurisdiction of the court of appeals is indirectly affected. We think that the rule-making authority of the Supreme Court existed as to all procedural matters and activities in the district court even though they might consequentially affect appellate jurisdiction." 218 F. 2d 295, 299. R. 46.

Similarly, in *Winsor* v. *Daumit*, 179 F. 2d 475 (C. A. 7th 1950), the Court of Appeals for the Seventh Circuit upheld the validity of the amendment against attack in a case where no findings were made, stating: "We think also, that the rule should not be considered as curtailing appellate jurisdiction but rather as one fixing the proce-

dure of the district court as to conditions affecting terms upon which an appeal may be taken in advance of a determination of the entire case." 179 F. 2d 475, 478.

The Court of Appeals for the Third Circuit describes the amendment as a "procedural rule" and notes that many procedural rules affect appealability and the timing of appeals, but do not, and do not purport to, enlarge or contract appellate jurisdiction. *Bendix Aviation Corp.* v. *Glass*, 195 F. 2d 267, 271 (C. A. 3rd 1952). See *Lopinsky* v. *Hertz Drive-Ur-Self Systems, Inc.*, 194 F. 2d 422 (C. A. 2d 1951).

Thirdly, as stated by the court below, appellate jurisdiction is just as much affected by the withholding of a certificate by the district judge to prevent appealability of a judgment admittedly final under pre-amendment tests, as it is by permitting an appeal of a judgment not previously appealable. 218 F. 2d 295, 299, R. 46. Yet, the negativists conceded, as does petitioner, that the amendment has this effect and is valid if given only this effect. Petitioner's brief, p. 22. It is difficult to understand how it can be within this Court's rule-making power to provide a way to postpone appealability of judgments formerly appealable and yet be beyond its power to accelerate appealability of judgments not previously appealable, but which finally dispose of a particular claim.

Petitioner emphasizes the statement of Mr. Justice Brandeis in *Washington-Southern Co.* v. *Baltimore Co.*, 263 U.S. 629, 635 (1924), that "no rule of court can enlarge or restrict jurisdiction." Petitioner's Brief, pp. 29-30. To the extent that it is in point in this case, the statement supports respondent's position rather than that of petitioner. It can be assumed that in adopting amended Rule 54(b), just as in adopting the original Rules, this Court

had well in mind this limitation upon its power. 28 U.S.C. § 2072. See *Sibbach* v. *Wilson*, 312 U.S. 1 (1941). The Court therefore did not intend to restrict or enlarge appellate jurisdiction and did not consider that the amended Rule had this effect. That these assumptions are correct is clearly demonstrated by the validity attributed to the negative effect of the amendment by all courts. If the amendment as affirmatively interpreted enlarges appellate jurisdiction, so necessarily does the negative effect restrict appellate jurisdiction. The plain fact is that jurisdiction, as that phrase is used by Mr. Justice Brandeis, is not affected under either view. Appellate jurisdiction is still fixed by statute, but this Court may nevertheless affect the timing of appeals by regulating procedure in the district courts.

Finally, such change as is effected by the amended Rule is sanctioned by Congress in the same manner as were the original Federal Rules; like the original Rules, the amendment has the force of statute. *Bendix Aviation Corp.* v. *Glass*, 195 F.2d 267, 272 (C.A. 3rd 1952). The court below made this point in its opinion in this case (R. 45), just as it did in *Winsor* v. *Daumit*, 179 F.2d 475, 477 (C.A. 7th 1950).

The amendment is, therefore, valid as an exercise of this Court's rule-making power."

" Rule 82 and the Enabling Act, 28 U.S.C. § 2072, add little to the discussion. Both indicate that the Federal Rules were intended to deal only with procedure in the district courts. This is conceded. Neither deals with the question of what judgments are appealable under Section 1291 or the extent to which the timing of appeals can be affected by procedure in the district courts.

d. The Courts of Appeals can and do review the findings of the district courts under amended Rule 54(b); the District Courts do not automatically and conclusively determine appellate jurisdiction.

The findings of the district courts do not, under the affirmative view, automatically and conclusively determine appellate jurisdiction, as is repeatedly suggested by petitioner. The findings of the district courts are reviewable and have been reviewed by the Courts of Appeals. Upon such review, the Courts of Appeals determine whether multiple claims for relief are in fact involved and whether the District Court has finally disposed of one such claim.

> ". . . Since under the Rule the district court has the power by certificate to attach finality only to an adjudication that finally disposes of one or more but less than all the claims, the certificate is not conclusive upon the appellate court that such an adjudication has been made." 6 Moore's Federal Practice, Second Edition (1953), p. 270.

There has not been a single decision in which a Court of Appeals has indicated that it was unable to review the correctness of the application of the amended Rule. On the contrary, there are several cases in which appeals have been dismissed notwithstanding the express determination and express direction of the district court.[38] There are many more—including one by the court below—[39] in which no Rule 54(b) findings were made and the Courts of Appeals stated that even if the findings had been made, the judgments would not have been appeal-

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[38] **King v. California Co., 224 F. 2d 193 (C.A. 5th 1955); Gold Seal Co. v. Weeks, 209 F. 2d 802 (C.A. D.C. 1954); Leonidakis v. International Telecoin Corp., 208 F. 2d 934 (C.A. 2d 1953); United States Plywood Corp. v. Hudson Lumber Co., 210 F. 2d 462 (C.A. 2d 1954); Steiner v. 20th Century-Fox Film Corp., 220 F. 2d 105 (C.A. 9th 1955). Cf. Phelan v. Middle States Oil Corp., 203 F. 2d 836 (C.A. 2d 1953). See Waialua Agr. Co. v. Maneja, 178 F. 2d 603 (C.A. 9th 1949).**

[39] **Hardy v. Bankers Life & Casualty Co., 222 F. 2d 827 (C.A. 7th 1955).**

able.[40] There is therefore no substance to this argument to which most of petitioner's brief is devoted.

e. This is a proper case for the application of amended Rule 54(b).

This is the kind of case for which original Rule 54(b) was adopted. The joinder of several causes of action arising out of several separate and distinct events, permitted under the original Rules, necessitated an accommodation of the standards of finality prevailing under the pre-Rules practice. Original Rule 54(b) and the decisions thereunder did not sole all of the problems of this accommodation, and the amended Rule was adopted in the light of and to remove some of these difficult problems. That it may not have solved all problems (Petitioner's Brief, pp. 37-46) or that additional legislation may be desirable (Petitioner's Brief, pp. 46-50), does not mean that the amended Rule is invalid or should not be given full effect.

One of the principal purposes of the amendment was "to reduce the uncertainty as to finality." 6 Moore's Federal Practice, Second Edition (1953), pp. 205-206. It is respondent's position that under original Rule 54(b) the judgment of the District Court would have been final and appealable. See above, pp. 13-24. But assuming, *arguendo*, that the judgment was not clearly appealable

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[40] **District 65, Distributive, Processing and Office Workers' Union v. McKague, 216 F. 2d 153 (C.A. 3rd 1954); Youpe v. Moses, 213 F. 2d 613 (C.A. D.C. 1954); Newburgh Moire Co., Inc. v. Superior Moire Co., Inc., 218 F. 2d 580 (C.A. 3rd 1955); Kuly v. White Motor Co., 174 F. 2d 742 (C.A. 6th 1949); Flanagan v. Northern Lumber Co., Inc., 222 F. 2d 539, (C.A. 2d 1955). See Brandt v. Renfield Importers, Ltd., 216 F. 2d 206 (C.A. 8th 1954); Farmer v. Powers, 204 F. 2d 509 (C.A. 5th 1953).**

on pre-amendment standards, it surely was not clearly non-appealable. At most, the appealability under the original Rule would have been uncertain. It was to eliminate uncertainty in this kind of situation that discretion was given to the district judges under the amended Rule. Hence, even if the question is doubtful under original Rule 54(b), the discretion of the District Court should be respected here. 6 Moore's Federal Practice, Second Edition (1953), p. 239-240. This may explain petitioner's default on the entire question of the appealability of this judgment under pre-amendment tests. Petitioner cannot demonstrate non-appealability; and even if it could create doubts as to appealability under the original Rule, such doubts would be a reason for respecting the District Court's exercise of discretion in making the express determination and direction under the amended Rule.

With the affirmative view generally prevailing in the Courts of Appeals, these courts are respecting the findings of the district courts, unless clearly erroneous. See above, pp. 24-28. For example, the Fifth Circuit—which has never expressly adopted the affirmative view of the amended Rule—in a case strikingly similar to this case, determined the merits of an appeal under the amended Rule. *Kinnear-Weed Corp.* v. *Humble Oil & Refining Co.*, 214 F.2d 891 (C.A. 5th 1954), *certiorari denied*, 348 U.S. 912 (1955). Moreover, it is clear that the Fifth Circuit does not consider itself conclusively bound by Rule 54(b) findings. See *e.g.*, *King* v. *California Co.*, 224 F.2d 193 (C.A. 5th 1955), in which the appeal was dismissed notwithstanding Rule 54(b) findings. See *Farmer* v. *Powers*, 204 F.2d 509 (C.A. 5th 1953).

The District Court expressly determined that in this case it would be unjust to delay the final determination of the sufficiency of Counts I and II. This deter-

mination is not challenged by petitioner. Apart from the technical reasons for such a determination, it is particularly appropriate where successive acts of business oppression are alleged and delay redounds to the benefit of the strong oppressor against a weak victim. Almost two and one-half years have passed since the complaint was filed. Various aspects of the case are pending in three courts: in this Court on the present review, in the Court of Appeals upon the merits of respondent's appeal and expressly in abeyance until the decision here, and in the District Court at issue on two counts. Even if petitioner is unssuccessful here, the case presumably will not proceed in the District Court until the legal sufficiency of Counts I and II is determined by the Court of Appeals.

As a matter of orderly administration, this case should be tried once. The District Court recognized this in making findings in accordance with the amended Rule; and the District Court is in the best position to make this determination. Nor will the determination of this appeal on the merits increase the number of appeals in this case. On the contrary, it may save one appeal. If on this appeal there is a determination of the sufficiency of the dismissed counts, the trial of the entire case will result in only one more appeal. On the other hand, if this appeal is dismissed, a trial on Counts III and IV will be followed by a second appeal which may require a subsequent trial of the dismissed counts and then a third appeal. See dissenting opinion of Mr. Justice Black in *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U.S. 176, 185-186 (1955).

III. If the District Court's judgment is held to be interlocutory, the dismissal of Count I is appealable under Section 1292(1) as a refusal to grant an injunction.

Count I alleges that the several acts complained of were done for the purpose of disciplining all of petitioner's suppliers with intent to monopolize trade and commerce. Respondent invokes Sections 1 and 2 of the Sherman Act and Sections 3, 4 and 16 of the Clayton Act, among others (R. 2), and seeks injunctive relief. (R. 8.) The dismissal of Count I constituted a refusal of an injunction.

Section 1292 of the Judicial Code provides as follows:

> "The courts of appeals shall have jurisdiction of appeals from:
>
> "(1) Interlocutory orders of the district courts of the United States, . . . or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions. . . ." 28 U.S.C. § 1292, 62 Stat. 929.

Accordingly, if this Court holds that the District Court's judgment is not appealable on pre-amendment standards and that the amendment to Rule 54(b) was not effective to make it appealable under Section 1291, the judgment is interlocutory and appellate jurisdiction exists under Section 1292(1). 6 Moore's Federal Practice, Second Edition (1953), p. 48.[41]

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[41] The Court need not concern itself with the conflict as to whether amended Rule 54(b) applies to cases under Section 1292(1), because here the findings under the amended Rule were made. Compare **Packard Motor Car Co. v. Gem Mfg. Co.**, 187 F. 2d 65 (C.A. 7th 1950) with **Cutting Room Appliances Corp. v. Empire Cutting Machine Co., Inc.**, 186 F. 2d 997 (C.A. 2d 1950), **Mow v. Republic of China**, 201 F. 2d 195 (C.A. D.C. 1952), and **Hook v. Hook & Ackerman, Inc.**, 213 F. 2d 122 (C.A. 3rd 1954). 6 Moore's Federal Practice, Second Edition (1953), p. 233.

CONCLUSION.

The judgment of the District Court finally disposed of two claims in a multiple claims case, leaving others for trial. The judgment is therefore appealable under Section 1291. The judgment would have been appealable under original Rule 54(b) and is therefore appealable under amended Rule 54(b), the requisite findings having been made. Even if not appealable under the original Rule, the judgment is appealable under the amended Rule. If it should be held that the judgment of the District Court is interlocutory, and therefore not appealable under Section 1291, it is appealable under Section 1292(1), as a refusal to grant an injunction.

The order of the Court of Appeals denying petitioner's motion to dismiss the appeal, should therefore be affirmed.

Respectfully submitted,

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